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86-75 (1)

Supreme Court, U.S.
FILED
JUL 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO: _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THOMAS J. CIAMBRONE, JR.

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Second Circuit

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July 17, 1986

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the decision below irreconcilably conflicts with the opinion of the Eleventh Circuit Court of Appeals in United States v. Heller, 785 F.2d 1524 (11th Cir 1986), and denied the Defendant his constitutional right to a fair trial by an impartial jury.

II. Whether the decision below presents an important question of federal law and creates irreconcilable conflict with the precedent established in this and other circuits by effectively abolishing the scienter element of a criminal offense by authorizing a conscious avoidance charge when there was no evidence that the Defendant was personally involved in the criminal acts, nor purposely ignored said criminal conduct.

PARTIES TO THE PROCEEDINGS BELOW

Thomas J. Ciambrone, Jr.
Jerry A. Chambrone
Joseph Vincent Riggio, Jr.
United States of America

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OPINION BELOW

The Opinion of the lower court is reported in United States v. Giambrone, 787 F.2d 799 (2nd Cir. 1986).

JURISDICTION

The Judgment of the Court of Appeals for the Second Circuit affirming the Petitioner's conviction was entered on April 24, 1986. On May 22, 1986, the Second Circuit denied the Petitioner's Petitions for Rehearing and Rehearing En Banc.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C., Section 1254(1) and Supreme Court Rule 20.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury... and to be informed of the nature and the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 U.S.C. Sec. 1951(a), Interference with commerce by threats or violence

Whosoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000.00, or imprisoned not more than twenty years, or both.

18 U.S.C. Sec. 1952 Interstate and foreign travel or transportation in aid or racketeering enterprises

Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with the intent to: (1) distribute the proceeds of any unlawful activity; or (2) commit any crime of violence to further any unlawful activity; or (3) otherwise promote, manage, establish, carry on, of any unlawful activty, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000.00 or imprisoned for not more than five years, or both.

STATEMENT OF THE CASE

A. Nature of the Case

Thomas J. Ciambrone, Jr. was named as a defendant, along with Jerry A. Chambrone and Joseph Vincent Riggio, Jr., in a seven-count indictment filed January 10, 1984. The Defendant was charged with conspiracy, in violation of 18 U.S.C. Sec. 1951, and with five counts of attempted extortion, in violation of 18 U.S.C. Sections 1951 and 1952. The Defendant was convicted of the conspiracy count and of three of the substantive counts, and was sentenced to a period of ten years incarceration, and fined.

B. Statement of Facts

1. Background

T.J., a small trucking company located in New Jersey, had for years been the exclusive delivery service for CSC, a large computer service company with an office in White Plains, New York. Thomas Ciambrone was

the president of T.J., but in 1976 he moved his family to Florida to enable his youngest son to attend special schools, and left the business to be run by his brother, Jerry Chambrone.

On November 15, 1982, CSC began using another trucking company by the name of Apple Messenger Service, (hereinafter "Apple"), to service zone 48, a delivery route which T.J. had been servicing for years. On November 17, 1982 pursuant to the contract between T.J. and CSC arbitration proceedings were commenced by T.J. against CSC, alleging that CSC had violated the exclusive contract between CSC and T.J. by allowing Apple to service zone 48.

2. The Conspiracy

The evidence at trial showed that Jerry Chambrone, with Joseph Riggio's assistance attempted to intimidate Apple into abandoning zone 48.

Much of the evidence detailing this conspiracy was of a vivid, sensational kind:

Miller, the president of Apple, told the jury that Riggio threatened to burn down his house and blow up his car; an Apple driver described how he was told by Jerry Chambrone to "watch yourself", and the same day his car was followed on the highway; tapes were played in wich Jerry Chambrone railed in obscene and threatening language against Apple and the CSC employees who dealt with Apple; a CSC employee testified that Jerry Chambrone told an Apple driver that he would "cut his balls off"; and finally, Riggio, described how, at Jerry Chambrone's instruction, he had manufactured firebombs in a friend's basement and threw them at Miller's home and office in the middle of the night.

Not one of these acts was ever in any way connected to Thomas Ciambrone. The evidence concerning Thomas Ciambrone, was of a much different -- and wholly innocent -- character.

3. Evidence Concerning Thomas Ciambrone

In essence, the Government's entire

case against Thomas Ciambrone was based on a tape-recorded conversation between Miller and Thomas Ciambrone on November 23, 1982. According to Miller's testimony, he was threatened by Joseph Riggio on November 20, 1982. He then told Riggio that he wanted to meet with Thomas Ciambrone. Thomas Ciambrone went to Miller's house on November 23. Miller had spent the day with the New Jersey State Police and was wearing a recording device to record his conversation with Ciambrone. Throughout the conversation with the Defendant, the only time the subject of threats was brought up was when Miller brought the subject up.

The tape shows that after some pleasantries and an inquiry by Thomas Ciambrone as to whether the conversation was being taped, (which Miller denied) the two men calmly discussed the contract between T.J. and CSC. Ciambrone told Miller that the contract had been in force for eighteen years, and that

CSC was now breaching the contract by dealing with Apple. He said that all the other messenger services had declined to "touch" the CSC account because they knew of the contract. Ciambrone added that the matter would end up in court soon and Apple would probably be named as a party.

Miller responded that he believed that his work for CSC did not breach any contract between T.J. and CSC and that CSC had invited his company to do the work. Miller then made a reference to the threat by Riggio. Ciambrone immediately responded that Miller was not being threatened by him, and that he never has dealt in business in that manner. He then went on to express how important his reputation is to him and his family.

Miller then asked if Riggio worked for T.J.. Ciambrone denied that Riggio had ever worked for T.J., but did state that Riggio had worked for CSC in the past.

The government's contention is that this

portion of the conversation between Miller and Ciambrone contained veiled threats, and constituted Ciambrone's overt act in furtherance of the conspiracy. No further evidence was introduced that claimed to demonstrate Thomas Ciambrone's participation in the extortionate schemes. No evidence was ever introduced which in any way linked Thomas Ciambrone to the extortionate acts that occurred as late as October 1983. The remaining evidence as to Thomas Ciambrone consisted of Riggio's testimony (the Government's lead witness) that Thomas Ciambrone had absolutely no involvement in the conspiracy; and evidence of Thomas Ciambrone's relationship with his brother and Riggio. The evidence showed that Thomas Ciambrone called his brother daily, sometimes more often, and that Riggio was a close frind of Jerry Chambrone, and an old acquaintance of the Defendant's.

The Defendant was acquitted of the substantive count Which was based upon this

conversation, but was convicted of the other substantive counts, wherein the government's own witnesses stated that he had absolutely nothing to do with those crimes.

REASONS FOR GRANTING THE WRIT

I.

The decision below creates irreconcilable conflict with the opinion of the Eleventh Circuit Court of Appeals in United States v. Heller, 785 F.2d 1524 (11th Cir. 1986), and denied the Defendant his constitutional right to a fair trial by an impartial jury.

The jury prejudice denied Thomas Ciambrone his constitutional right to a fair trial. The panel of the Second Circuit focused its attention almost exclusively on the sufficiency of the evidence, and in so doing overlooked the issue of jury prejudice. The holding directly and expressly conflicts with the holding of the Eleventh Circuit in United States v. Heller, 785 F.2d 1524 (11th Cir., 1986), and to condone such egregious juror conduct impunes and threatens the very basis of our trial system.

In Heller, the Eleventh Circuit reversed

Defendant Heller's conviction of tax evasion and falsely subscribing to an income tax return, based upon juror misconduct in the form of racial and religious slurs. The Court reversed the conviction solely upon the issue of juror misconduct, refusing to decide any of the other pending issues.

In Heller, one day after the jury began deliberations, the following note was sent out:

November 9,1983

Your Honor,
Should these actions be addressed?
During the course of this trial, there were comments in the jury room about various testimony. Also, some ethnic slurs were made.
During the course of this trial, a juror asked a "reliable accountant", the following question (outside the jury room):

"Is it possible for an accountant to make out a person's income tax return without knowing about the person's books?"
Answer: No

The juror stated that outside the jury room, he asked a hypothetical question of a reliable accountant along these lines: "What is the responsibility of an accountant when he signs his name to a tax return?" The accountant was reported as saying

"virtually none in the case of an individual return. In the case of a business return, his involvement would be considerable."

Please advise.
Thank you. Virginia Davis Starker, Foreperson.

Upon receipt of this note, the trial judge ordered the jury to stop deliberating, and decided to voir dire each juror individually. During this voir dire one of the jurors told the judge that when the trial had barely started another juror said, apparently in jest, "Well, the fellow we are trying is a Jew. I say, let's hang him." The juror further stated that several other anti-Semitic slurs had been made throughout the trial. When Juror Nolan was questioned he admitted making an anti-Semitic slur. When questioned further, the juror claimed that his remarks were made outside of the courtroom in a "joking" or "teasing" manner. He also admitted that his comments were later repeated to several jurors in the same joking or teasing manner.

After the trial judge concluded the individual voir dire in Heller, he asked each juror whether in light of what had occurred, they would still be able to reach a decision in the case based solely on the evidence and the law without bias or prejudice. Then he called the entire panel into the courtroom and asked them to confirm their earlier promises. After each juror confirmed his/her promise, the court allowed the deliberations to continue.

The Eleventh Circuit reversed holding:

> The bigotry displayed in this case is reminiscent of another less civilized era when anti-Semitic and racist sentiments were unfortunately acceptable even in polite society. We conclude that we must act in the only way open to us to ensure that prejudice plays no role in the function of our judicial system. Although we are aware that the trial in this case lasted 12 weeks and that retrial will entail considerable time and expense, this factor cannot even be outweighted when the right of an individual to a fair trial has been so severely compromised. Heller at 1529.

Similarly, in the case at bar during the second day of jury deliberations, one juror approached the Court and recounted statements made by another juror during the course of the deliberations about Italians being part of the mob and expressing her "hate" for Italians.[1] The Court upon hearing this account, question the juror who made the statements. As in Heller, the juror admitted her ethnic bias and her belief that all Italians are part of the "mob". Instead of either discharging the juror or declaring a mistrial the court allowed the deliberations to continue.

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[1]The statement of the reporting juror was:

> This juror said, just like this: "They are part of the mob." I said, "What mob do you mean?" just like that. "That wasn't told to us. The judge said we should keep an open mind."
>
> I said, "If you are bringing into the situation," you know. I made a face.
>
> She said, "What is the difference?" or something pertaining to that. "They are all the same people" -- that I remember -- "connected."
>
> I says, "What do you mean? What are you bringing up? Are you trying to say that is is the Mafia? That wasn't brought up into this."

Also, as in Heller, the Court gave a cautionary instruction; simply telling the jury that the fact that the Defendants are Italian has nothing to do with the deliberations, and then the Court reminded the jurors that the verdict cannot be based upon ethnic values. The Second Circuit held that this instruction was sufficient to insure that the verdict was not tainted.

The similarity between the facts surrounding the jury prejudice presented in this case and that in Heller cannot be overlooked, nor can the discrepancies in the holdings be justified by the factual differences. In both cases one juror had made ethnic slurs, indicative of his personal bias in the presence of the jurors. Both jurors

[1] con'td.

She said, "I think -- I have to say this, and if any juror doesn't in there say the truth -- she put her hands on the table. She said, "I hate them," banging her fists on the table. She says, "my son is fighting them."

.....

admitted to these biases when questioned. In Heller, the court took the time to voir dire each individual juror and to elicit a personal promise to put said biases aside and to judge the defendant solely on the evidence presented. In this case, the Court gave a group cautionary instruction, similar to the one given in Heller, but never bothered to inquire of each juror whether he or she had been influenced by the statements made in the jury room. Using this precedure alone, the court could not ensure the Defendant a fair trial, untainted by jury bias.

These two cases are irreconcilable and create absolutely no standard for the Federal Courts to follow when similar questions are presented in the future. For this reason this Court must take Certiorari to resolve this conflict and to establish standards to be applied in future cases.

II

The decision below presents an important question of federal law and creates an irreconcilable conflict with the precedent established in this and other circuits by effectively abolishing the scienter element of a criminal offense by authorizing a conscious avoidance charge when there was no evidence that the Defendant was personally involved in the criminal acts, nor purposely ignored said criminal conduct.

At the Government's request, the district court instructed the jury that a Defendant could not avoid "a finding of guilty knowledge" by "deliberately closing his eyes to what otherwise would have been obvious to him." [2] The district court them emphasized the importance of this instruction as to the Defendant in particular. The giving of this

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[2] The district court's instruction was the following:

In determining whether the defendant you are considering acted knowingly and willfully, you man consider whether the defendant deliberately closed his eyes to what otherwise would have been obvious to him, and that is a consideration of some importance in this case, particularly with regard to Thomas Ciambrone's contentions. It is the settled law that a finding of

instruction in this case denied the Defendant a fair trial and conflicts with the precedent established in the Second Circuit as well as every other Circuit which has considered this issue.

The federal courts have carefully limited the situations in which a conscious avoidance charge is appropriate to circumstances where the defendant may have avoided learning the facts that make his own conduct unlawful. See for eg. United States v. Jewell, 532 F.2d 697 (9th Cir. 1976), cert. denied, 96 S.Ct. 3173 (1976); United States v. Guzman, 754 F.2d 482, 488 (2d Cir. 1985), cert. denied, 106 S.Ct. 788 (1986).

The facts presented in this case do not fall within the factual patterns wherein the courts have held the conscious avoidance charge as appropriate. On the contrary, the

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[2] con'td.
guilty knowledge may not be avoided by a showing that the defendant simply closed his eyes to what was going on about him; "see no evil" is not a maxim in which the criminal defendant should take any comfort. (Emphasis added)

application of the concious avoidance charge in the case at bar creates a dangerous new precedent. To convict the Defendant on any count the Government had to demonstrate that Thomas Ciambrone specifically intended that his alleged co-conspirators accomplish their illegal aims. There is no question that Thomas Ciambrone was not directly involved in any of the substantive extortianate crimes. His only link to those crimes comes from his alleged involvement in the conspiracy as a whole. Therefore, the Defendant's "intent" was the most crucial issue at trial.

To allow the District Court to give this charge, which in effect takes from the jury the issue of scienter, by imputing to the Defendant knowledge of the co-Defendant's actions simply because of his involvement in the conspiracy unquestionably denies the Defendant a fair trial and directly conflicts with the established precedent.

The Second Circuit cites United States v. McAllister, 747 F.2d 1273 (9th Cir. 1984), to support its position condoning the appropriateness of a conscious avoidance charge in the instant case. However, even a cursory reading of McAllister demonstrates that the court's reliance is erroneous, and that the conscious avoidance charge as given in the instant case denied the the Defendant a fair trial and creates a frightening precedent. In McAllister, the Ninth Circuit held that the conscious avoidance charge is "properly given only when a defendant claims a lack of guilty knowledge and there are facts in evidence to support an inference of deliberate ignorance." At 1275, citing United States v. Henderson, 721 F.2d 276, 277 (9th Cir. 1983); United States v. Suttiswad, 696 F.2d 645, 651 (9th Cir., 1982); United States v. Murrieta-Bejarano, 552 F.2d 1323, 1325 (9th Cir., 1977). In all of the cases cited, and without exception in any

other circuit, the conscious avoidance charge has only been given in situations in which the Defendant avoided knowledge of his own conduct. The instruction has been upheld as proper where the Defendant was driving a truck filled with illegal aliens, United States v. McAllister, supra; where the Defendant entered the United States driving an automobile with marijuana hidden in secret compartments in the vehicle, United States v. Jewell, 532 F.2d 697 (9th Cir., 1976), cert. denied, 96 S.Ct. 3173 (1976); and where the defendant was the sole driver of a truck where marijuana was located inside the flatbed of the truck, United States v. Murrieta-Bejarano, 552 F.2d 1323 (9th Cir. 1977), rehearing and rehearing en banc denied, (1977). But there is no precedent authorizing the instruction where the government admits that the Defendant did not participate in the alleged criminal activity, and the prosecution is based upon a co-conspirator or accessory theory.

The precedent is firmly established that this instruction is not appropriate for a conspiracy charge on the grounds that it is impossible for a person to avoid participating in a conspiracy and yet be a member of the conspiracy. United States v. Mankani, 738 F.2d 538, 547 (2d Cir. 1984). Since the Defendant was prosecuted in this case on the substantive counts under the guise of a conspiracy theory, the reasoning behind the holding in Mankani is applicable and binding. Giving this instruction under these circumstances directly violates the limitations imposed by the courts, and denied Thomas Ciambrone his constitutional right to be tried on each element of each offense. Furthermore, the fact that the Defendant was singled out in the court's instruction to the jury, only aggravates the prejudicial effect of this instruction. United States v. Campanale, 518 F. 2d 352, 362 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976).

Certiorari must be granted to resolve the conflict created between this opinion and those of the other Circuits, and to remedy the injustice suffered by Thomas Ciambrone.

CONCLUSION

The case below characterizes a radical departure from the substantive body of case law developed by this and other circuits directly conflicts with the holding of the Eleventh Circuit. The issues involved in this case are of extreme judicial significance. The maintenance of uniformity in the administration of criminal justice in the federal courts is jeopardized by the decision below. For the reasons and authority advanced above, the Petitioner strenuously urges this Court to grant its Writ of Certiorari in this case.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that all parties required to be served herein have been served and further certify that three copies of the foregoing Petition have been served by United States mail this 18th day of July, 1986 upon the office of the United States Solicitor General, 10th and Gonstitution Avenue, N.W., Washington, D.C. 20530, and a copy upon Ann Ryan, Esquire, Assistant United States Attorney, at 1 Saint Andrews Plaza, New York, New York 10007.

By: Barry Witlin
BARRY WITLIN, ESQUIRE

APPENDIX A

Opinion of the Lower Court

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 255—August Term, 1985

(Argued October 21, 1985 Decided April 4, 1986)

Docket No. 84-1249

UNITED STATES OF AMERICA,

Appellee,

—v.—

THOMAS J. CIAMBRONE, JR.,

Appellant.

Before:

OAKES, NEWMAN, and KEARSE,

Circuit Judges.

Appeal from conviction in the United States District Court for the Southern District of New York, Robert L. Carter, Judge, of conspiracy to extort and substantive convictions of attempted extortion or acts of extortion on

the basis of insufficiency of the evidence, a conscious avoidance charge, and juror taint.

Affirmed.

SIMON H. RIFKIND (Robert S. Smith, Eric S. Goldstein, Paul, Weiss, Rifkind, Wharton & Garrison, New York, N.Y., of counsel), *for Appellant.*

ANNE C. RYAN, Assistant United States Attorney (Rudolph W. Giuliani, United States, Attorney for the Southern District of New York, Warren Neil Eggleston, Assistant United States Attorney, of counsel), *for Appellee.*

OAKES, *Circuit Judge*:

Thomas Ciambrone appeals from a conviction in the United States District Court for the Southern District of New York, Robert L. Carter, Judge, for one count of conspiracy to commit extortion and three counts of attempted extortion in violation of the Hobbs Act, 18 U.S.C. § 1951 (1982). Ciambrone was sentenced to a term of imprisonment of ten years on each of the counts on which he was convicted, the sentences to run concurrently, and to pay a fine of $4,000 on each count. We affirm.

There is no question that there was a conspiracy to commit extortion and that numerous overt acts were committed in furtherance of that conspiracy. Thus, the major question before us is whether there was sufficient evidence of appellant Ciambrone's participation in the conspiracy. Additional questions are raised as to the admission of co-conspirator statements against him, the district court's instruction on conscious avoidance, the possibility that a juror's remarks that the defendants "were on the fringe of the Mafioso" or "part of the mob" tainted the jury deliberations, and whether appellant should have been tried with his obviously guilty younger brother, Jerry Chambrone, and with Joseph Vincent Riggio, Jr., who among other things sought to blow up the car of one of the victims and did manage to burn down another victim's house and business office with Molotov cocktails. Jerry Chambrone was convicted and did not appeal. Riggio pled guilty and testified for the Government.

BACKGROUND

The goal of the extortion scheme was to regain for T.J. Associates ("T.J."), a company owned and operated by Thomas Ciambrone and his brother Jerry, certain delivery business of Computer Sciences Company ("CSC"), a nationwide computer services company. CSC had transferred that business from T.J. to Apple Messenger Service ("Apple"), a company operated by Donald Miller. Appellant Thomas Ciambrone was president of T.J., and though he lived in Florida during the time period covered by the indictment—May 1982 through January 1984—was in regular contact with the T.J. office in White

Plains, New York, and responsible for major business and operations decisions. Jerry Chambrone was the on-the-spot manager of T.J. and responsible for the day-to-day operations of the business.

CSC provided accounting and payroll services to a number of businesses, and using its data base, it would print out payroll checks that were delivered to clients in various geographical areas. For some time prior to November 1982, T.J. made CSC deliveries to Zone 48, which is in Westchester, Putnam, and Dutchess Counties in the state of New York. After Brinson Weeks, a CSC employee, was transferred from corporate headquarters in California to the White Plains office, however, he hired Apple to replace T.J., and on November 15, 1982, Apple began servicing the Zone.

About the time that T.J. lost the Zone 48 business to Apple, Jerry Chambrone spoke about it to Joseph Riggio, a childhood friend of Jerry and of his brother Thomas. Chambrone told Riggio that Apple president Miller had "infiltrated a trucking route which was under contract by T.J. and had made no attempt to come and try and talk to us ab[o]ut it." Chambrone asked Riggio to talk to Miller and "make the man understand what he was doing wasn't right."

As a result, Riggio went to Miller's home in West Milford, New Jersey, on November 20, 1982. Riggio urged Miller to stop doing business with CSC. Although Riggio denied it, Miller testified that during this conversation Riggio threatened to burn down his house and blow up his car. Riggio himself admitted at trial that he had compared the payroll delivery business to the garbage business, suggesting that truckers have "area rights" and

that "the only way to survive" is to have "respect for each other's work." Miller also testified that Riggio "said he was sent by Tom Ciambrone." Riggio told Miller, as they both testified, that the [Ch/Ci]ambrones had "obligations in New York City" and that "[t]here are certain friends that take a personal interest in their business dealings and financial obligations." Miller told Riggio he wanted to speak to Thomas Ciambrone, and Riggio agreed to arrange a meeting.

Riggio then relayed his conversation with Miller to Jerry Chambrone and warned Jerry that Thomas Ciambrone's conversation with Miller should be "strictly business" since Miller might be tape recording the conversation. Jerry Chambrone said he would relay Riggio's description of the conversation with Miller to Thomas and told Riggio that his brother would take an 11:30 flight from Florida to New York the following day, November 21, 1982. Riggio relayed this information to Miller, who agreed to meet with Thomas Ciambrone on November 22, 1982.

Thomas Ciambrone caught his 11:30 flight and made several attempts to reach Miller during the day and evening of the 22nd. The Apple president, however, spent the day with the New Jersey State Police, and Ciambrone's initial efforts to contact him at work were thus unsuccessful. At 9:30 p.m., after making numerous phone calls and after going to the Apple office and banging on the door, Thomas Ciambrone finally reached Miller by telephone at home and they agreed to meet the following day.

Miller wore a microphone and transmitter during his meeting with Ciambrone so that the conversation that

took place was recorded by the New Jersey State Police. A transcript and tape recording of that conversation were in evidence at trial with only a few details of the conversation in dispute. This court has listened to the tape recording. The conversation is important to the case and therefore will be recounted here at some length.

After some preliminary amenities, Miller asks Ciambrone, "So what do you have to talk to me about?" Ciambrone responds, "I just thought there was a couple things you should know so, the rest of it is up, up to you." According to the Government's version of the tape, Thomas Ciambrone then says, "We have a contract with them. I want you to realize that, ya know. And uh, are you facing me because I am on tape recorder or . . . ?" According to the appellant's version, he says, "We have a contract with them. I want you to realize that, ya know. And, uh, are you facing that way because I'm not tape record—[unintelligible]." We think the Government's version makes more sense and, having listened to the tape, are convinced that in any event Thomas Ciambrone, following up on Riggio's suggestion to Jerry Chambrone, was—almost in a laughing manner—checking out whether he was being tape recorded. Miller replies, "No. You want me to sit this way?" Appellant says, "I don't care." He then begins to talk about his contract with CSC and T.J.'s eighteen years of work for the computer company. Partly unintelligible conversation takes place in the course of which Thomas Ciambrone says that "we're goin[g] to court," and then he says that

> all the other messenger services, heavy, heavy messenger services, uh, armored trucks, (unintelligible) they haven't bothered to touch it because they know the situation and I guess you didn't know so I just

> figured I let you know because what it will end up being is we're going to court. You'll probably be named in it which will be very stupid. You'd have to be.

After discussing the litigation, Ciambrone adds, "I just figured when the drivers, for some reason have been pissed, and said they were gonna take things in their own hands and all the rest of that shit, I said that's stupid. Right!" This last comment could clearly be taken as a hint at violence on the part of T.J.'s drivers.

After some more discussion, Ciambrone informs Miller,

> I felt personally, okay, I can't speak for other people but since I'm the owner of the company uh, I think you should just . . . . You're turning open a big can of worms here. They're using ya. And I know you want the business. They're holdin[g] back. Show you letters, payment that they owe us for some work that we've done.

Miller tells Ciambrone that CSC asked him to apply for the business, that he gave the company a price on Zone 48, and that CSC accepted his offer.

The conversation then turns to a subject of critical importance in determining whether Ciambrone was involved in the conspiracy. With obvious reference to Riggio's comments of two days before, Miller says, "Alright now I'm being threatened. Where, where do I come down there. Where do I stand?" Ciambrone abjures, "Not by me you're not [being threatened]." Miller responds, "Well, Joe Riggio came here and said he was sent by you. Said he . . . ." Ciambrone interrupts,

> No sir, not by me. I don't, I don't threaten anybody. I never threatened anybody in my life. Ever. Like I said, and I say this very seriously. The drivers have gotten really, they grew up with everybody here and some of the people that work for you grew up with them. Okay. Uh, I don't deal in business that way, I never have."

Parenthetically, it may be noted that the reference to the drivers is presumably to Ciambrone's earlier comment that they were "pissed off."

Ciambrone continues,

> The one thing that I have, and I've had all my life, including right here . . . is a reputation. I have my word, my bond *and* if anything, all the customer relationships that we have with regards to the areas. First of all, they're with, they're with the unions, which I'm not. Understand that, I never have been.

Miller presses Ciambrone by asking, "Is Joe Riggio with the union?" Ciambrone replies, "They . . . everybody's with the unions. I'm not with the unions."

Miller asks Ciambrone, "Does he [Riggio] work for you?" According to the Government's version, the T.J. president replies, "Joe Riggio never worked for me at all." According to Ciambrone's version, he replies, "Joe Riggio don't work for me at all." We are inclined to take the latter version since Miller's next question—"Did he ever work for you?"—makes sense only as a follow-up to Ciambrone's version of his statement. In any case, Ciambrone answers the question, "Uh, ten years ago, five or eight years ago, nine years ago. Worked for the same company. They got rid of him." Miller next asks Thomas

Ciambrone, "They did or you did [fire Riggio]?" Ciambrone says, "They didn't want him. See, part of the contract reads they have the right. If they don't like somebody, they don't give a shit who he is, they have the right to release him."

Thomas Ciambrone tries to change the subject. He says, "If you have a driver that could be the best in your business and they don't like him, they have the right to do that. Now . . . ." But Miller leads him back to the threat. "[O]ne thing that I don't particularly like Tom, is the fact that when I was approached on this, it was through a threat. My driver was threatened, I was personally threatened that my house would be blown up or burned down." Ciambrone asserts, "Well, I, I have no idea about that." Miller persists, "He came as a direct messenger from you . . . ." "No sir," Ciambrone interrupts. Miller then pointedly comments, "And after I spoke to him I said I'd like to talk to you and the next day you're flying up here to talk to me." Miller's observation implies that Riggio's and Ciambrone's activities were closely connected and that Ciambrone had knowledge of Riggio's behavior since Ciambrone had traveled from Florida to New Jersey in response to a request made by Miller to Riggio. Ciambrone fails to rebut the implication. He confusedly says, "I was flying up here to . . . no, I was gonna see you anyway. I had a meeting, uh with CSC. We were in a meeting right now for four hours." He again changes the subject, "They're ready. . . . Because of the last letters that we sent which is gonna uh, the next letter which will be sent I guess legally which will incorporate the constitution of our services and it will incorporate you so uh, I mean we know where the service comes from." He follows this with, "I don't do things like that

[threaten people]. Uh, that can be only verified by uh, 500 people in this town. Some of them don't like me, jealous or whatever, okay, I don't do things that way. Never have, don't intend to, don't want to." There is not a word spoken in outrage at Riggio's threats, much less a statement that Ciambrone will try to stop Riggio from making or carrying out such threats. Ciambrone merely tries to distance himself from Riggio's actions.

> What people may want to do and say is their prerogative, okay, they and the company, which pays us for this service, okay, we pay unions to stay out of our hair. Since the company has cut back and not paid me my dollars and my monies and everything else that's involved, okay. The unions have the prerogative to do whatever the hell they want. I don't pay them. I paid them for 15 years. Leave me alone, what do you want, policemen's ball or whatever the hell they call it.

Ciambrone is obviously alluding to the fact that he has had to pay off the unions to keep them from creating problems for his company and he implies that Riggio is a union person. He then discusses CSC: "[T]hey're hurtin[g] because they put somebody in the job [Brinson Weeks] that didn't know what the hell's goin[g] on and they don't have the right to go and do what they're doin[g]. I come to speak to you because I was comin[g] to speak to you anyway," suggesting that he did not come because Riggio asked that he do so. Ciambrone continues,

> I came to speak to you because the drivers thought that I should speak to the people that are involved and tell [']em, explain to [']em that hey, we do have a

> contract, ah what they're doing is creating a hurt on the people that should be working. All you're doing is taking work off somebody that was working . . . .

This statement alludes back to the drivers being angry. He then goes on to say,

> The only point of issue is that the service that we have, and the only service that we have is the whole total effort. . . . If you like you can call the lawyer, you can go see the contract yourself. You can read it and make your own decision. I just think that it's gonna get to be a real stupid, ridiculous nonsense of a lawsuit . . . .

He says that CSC owes T.J. over half a million dollars and that "[w]hen it comes to damages and claims, we're gonna have to include all the people that have created us damages and claims. You're gonna be one of them, that's what the lawyer told us." He says, "You could do business with [CSC]. All their business is supposed to come to us."

Miller suggests that it would be "stupid" for Apple to stop working for CSC. Thomas Ciambrone replies, "No, I'll tell ya, at this stage of the game I don't think that uh, uh, anything you want to do is stupid, you have [to] go to work and do what you gotta do." After asserting that T.J. won its contract with CSC through competitive bidding, he refers again to the "big lawsuit." And Ciambrone says, "I was told not even to bother to come [to see Miller]. I said, well, I live in town. I do know the guy. And I did know you. Well, let me go talk to him." Then he refers back to the threats:

> As far as people coming up to talk to you or do things, I have no idea. Don't wanna know about it, I don't care to know about it. And you can tell [']em—anybody. It has nothing to do with . . . . Don't ever let them use my name. I don't use people. I use myself as an individual. I do it by the law. I've done it that way. Good, bad or indifferent, if it comes out that's what God meant it to be. If it comes out good, then I'm right. If it comes out bad, then I'm stupid. I've been there before . . . many years ago, uh, it came out bad but it ended up coming out good because uh, a year down the road uh, it was a reversed decision . . . . Hey listen, there are a lot of people out there that prostitute, I don't believe that you should do that in your business.

Ciambrone continues,

> I don't think that you come from the areas where people would just do it [whatever "it" is] to be spiteful. They're using whatever method they can to try to bring my company to its knees . . . . Uh, for your own knowledge, let them show you a contract, if they will.

He then stresses that T.J.'s contract is an "exclusive" one.

Miller says that he is going to stay in business with CSC but asks Ciambrone to give him a copy of the contract so that he can evaluate the situation. Ciambrone replies, "[W]hy don't you ask them for the contract. See if they'll allow you to read the contract?" Miller says that CSC will not allow him to do so. Ciambrone says, "I'd show you, but I would like you to ask them first. There's a reason for this. The story of Moses uh, and the pharaohs." The story that Ciambrone relates is that of two women who

> come with a baby and one says we'll split it in half and the other one says no give the baby whole. The pharaoh knows which one is the mother because the mother wants the baby in one piece. Just see what they'll say. What else can I tell you.

Ciambrone says if CSC refuses to allow Miller to examine the contract, "[t]hat's gonna tell ya somethin[g]. I'll still let you read mine. I'll tell my lawyer, you know." Miller asks him if he has a copy of the contract and Ciambrone says, "I don't have it here."

After some further conversation, Ciambrone returns to a topic previously discussed.

> It's your prerogative. The rest is up to you. I just figured it's gonna be shit. You know, its gonna be, excuse the expression, it is gonna be uh, a big uh hullabaloo. It's gonna be uh, uh litigation, it's gonna be arbitration, part of the contract, and part of the court you're in now . . . . [W]e'll have to subpoena whoever the hell, is gonna be involved in this thing.

After a brief interchange, Ciambrone delivers a long monologue and urges Miller to "feel them out first," "[s]ee who's on the right side or the wrong side of the coin," "get a hold of the contract." He continues: "I came which, for all practical purposes I shouldn't even have bothered. I mean, I'm being up front with ya. What happens only comes out in the wash. And uh, if it uh, if it comes down, it may be very bad for me for being here." He does not explain what "it comes down" means or why his meeting with Miller could "be very bad" for him.

Ciambrone tells Miller,

> I'm being very up front with you. [']Cause they could say [whoever "they" are] well I came to see you and whatever else is involved. I came to just explain to you exactly what they're doing, okay. Whether you do or don't do business with them is none of my God damn business, okay . . . . If it's fair, competition is the greatest thing in the world.

He alludes to his pride in his years of service and continues,

> I don't care in the least, I really don't. It's just that when somebody prostitutes what they're doing, and I use that word in the fashion that it's meant. Uh, that, that bothers me, they're not being sincere and up front about what they're doing and I think that you should at least, at least have the privilege to know what they're doing.

He continues,

> I don't know what the hell is gonna come about. Uh, where it's gonna go from that point. It may go 100 percent in your favor. You know, I don't know what's gonna happen when you go to the court. You know uh, Sacco and V[a]nzetti, if you remember that case. Two of the most innocent guys in the world and . . . they nearly put [']em to death.

Miller informs Ciambrone that until he sees a contract he will continue to do business with CSC. Ciambrone says, "Fine," and Miller reminds him that "right now, I have nothing to read." Ciambrone reassures him that he will give him a copy of the contract if he is allowed to, "if it's legal or whatever." When Miller subsequently refers to

Ciambrone as "Joe," confusing him with Riggio perhaps, Ciambrone takes umbrage: "Tom . . . . Please don't call me that."

Ciambrone again asks him to ask CSC for the contract and adds a rather odd allusion,

> Okay, you ask them. That's all. You know, who gives blood and who won't. If I come up and say here's my arm take the blood, the other guy says I will but he doesn't . . . who's your friend? You know what I'm trying to say? I'm not saying I'm their friend, I'm just explaining what's going on . . . . You know? But, uh and I don't send anybody knocking on your door. Ever. Before I do that. I have four children, I have a home, I believe very strongly in God, I don't believe in that shit. Excuse the expression. I believe in talking to people like you're supposed to talk.

"Okay," says Miller, and Ciambrone says, "Thank you very much for the time." Miller says, "Take care."

On November 24, 1982, the day after the meeting between Miller and Ciambrone, Brinson Weeks of CSC was followed by three men in a truck after pulling out of the CSC lot, but he was able to evade them, return to CSC, and secure an escort home. On December 21, 1982, when Scott Kunzelman, the Apple driver then assigned to Zone 48, arrived at work Jerry Chambrone told him to "watch yourself" and as he drove away Kunzelman was then followed by a car with "T.J. Trucking" written on the side. He, too, eluded his pursuer. During this same period Jerry Chambrone told a CSC employee, Norman Harrison, "that he was aware of where Scott [Kunzelman] socialized when he was not working, and that if

he didn't stop . . . if they didn't give him back Zone 48, that he was going to cut his balls off." All defendants were convicted on the substantive count that this threat involved.

Six months later, on June 1, 1983, Brinson Weeks's car was set on fire as it sat in a numbered space in a lot outside of his apartment complex in Greenwich, Connecticut, at an early hour of the morning. Jerry Chambrone told two men at CSC in a recorded conversation that whoever firebombed Weeks's car "only warned him," and added that "If I do it . . . I'll make sure that fucker is in it. He deserves to be in it." At the trial, Riggio testified that in a conversation with Jerry Chambrone during the summer of 1983 "[i]t was said that Mr. Weeks had a problem" and that Jerry was "in a good mood" in discussing Weeks's house being blown up and his summer home catching fire in Colorado.

In early September 1983, when Miller made no further attempt to contact T.J. Trucking and CSC continued to have Apple do the delivery work, Chambrone asked Riggio to burn one of the Apple driver's cars. Riggio twice drove to CSC with a Molotov cocktail ready to light and throw, but each time he arrived after the cars had left for the day. After the second of these occasions Chambrone indicated to Riggio that Miller "should be taught a lesson" and they later discussed blowing up Miller's house. Riggio testified that he warned Chambrone that "they are going to come down like a ton of bricks on us . . . . All of us, probably your brother, you, me." Chambrone said he wanted the house to be blown up and, according to Riggio's testimony, "made a gesture with his hand going down towards the ground as he said that." The price for the job was to be $4,000. On October 5,

1983, Riggio, accompanied by a friend, Frank Romano, went to the Miller home and one hurled a Molotov cocktail in the front of the house and the other threw one at the window of Apple's office, which adjoined the house. Both buildings caught fire.

The police arrested Riggio during the early morning hours of October 6, 1983. Later that morning a brief collect telephone call was placed from the T.J. office in White Plains to Thomas Ciambrone in Florida.

Chambrone paid Riggio $4,000 in cash for the firebombing and Riggio gave his partner Romano half of that. In addition, Riggio subsequently received $20,200 from Jerry Chambrone. The firebombings of the Miller home and the Apple office were the subjects of Counts Five and Six of the indictment; Ciambrone was found guilty of attempted extortion on both counts.

About a month after the firebombings, Jerry Chambrone blocked the path of Apple driver Linda Daly in the CSC lot and followed her back and forth as she loaded her car, telling her in an angry voice, "I want you to tell Don Miller that I'll never forgive him for as long as I live, and I'll remember him for a long time to come." The threat was the subject of Count Seven in the indictment; Jerry Chambrone was convicted on that count, but Thomas Ciambrone was found not guilty.

DISCUSSION

It is clear that there was a conspiracy to commit extortion. There was overwhelming evidence that Jerry Chambrone and Riggio were participants in such a conspiracy and there were repeated incidents of threats as

well as violence in seeking to force Apple and CSC to abandon their business relationship. The question is, of course, whether there was sufficient evidence to link Thomas Ciambrone to that conspiracy. In answering that question, we are required, in view of the jury verdict, to consider the evidence in its totality and make all permissible inferences in the light most favorable to the Government. *United States v. Orozco-Prada*, 732 F.2d 1076, 1081 (2d Cir.), *cert. denied*, 105 S. Ct. 154 (1984); *United States v. Carson*, 702 F.2d 351, 361-62 (2d Cir.), *cert. denied*, 462 U.S. 1108 (1983). Moreover, as this court has recently held, "[o]nce a conspiracy is shown to exist, the 'evidence sufficient to link another defendant to it need not be overwhelming.'" *United States v. Provenzano*, 615 F.2d 37, 45 (2d Cir.), *cert. denied*, 446 U.S. 953 (1980) (quoting *United States v. Head*, 546 F.2d 6, 9-10 (2d Cir. 1976), *cert. denied*, 430 U.S. 931 (1977)); *United States v. Paone*, Nos. 84-1454 et al., slip op. at 1476 (2d Cir. Feb. 5, 1986). It is necessary only that there be "evidence of such substantiality as to justify a reasonably minded jury in believing beyond a reasonable doubt that the defendant was, in fact, connected with the conspiracy." *United States v. Malatesta*, 583 F.2d 748, 762 (5th Cir. 1978) (Coleman, J., concurring), *aff'd en banc*, 590 F.2d 1379 (5th Cir.), *cert. denied*, 440 U.S. 962 (1979). *But cf. United States v. Tyler*, 758 F.2d 66 (2d Cir. 1985) (conspiracy conviction reversed on sufficiency grounds where no evidence of an agreement between the only two alleged participants).

On balance, we find there was sufficient evidence to support Thomas Ciambrone's conviction. Ciambrone was intimately involved with T.J.'s operations. He was president of T.J. and stood to lose or gain as much as anyone

depending on the outcome of the conspiracy. He made major decisions and, although he lived in Florida, he talked with his brother, the day-to-day manager of the company, as often as three times daily. Ciambrone also clearly participated in the nonextortionate part of the campaign to win back the business that Apple had taken: he met with Brinson Weeks on three occasions to discuss arbitration or settlement of the Zone 48 problem. Of course, these facts and incidents alone would not have permitted the jury to infer that Ciambrone and his brother consulted about the extortion scheme and the hiring of Riggio. But combined with the Miller-Ciambrone conversation, its context, and both prior and subsequent events, they adequately supported Ciambrone's conviction.

According to Miller's testimony, at the meeting at which Riggio threatened the Apple president, Riggio informed Miller prior to the threat that he had been "sent by Tom Ciambrone and that he [presumably Ciambrone] had friends and obligations in New York City and that those friends were also his [presumably Riggio's] friends." The question eliciting this testimony was objected to on unspecified grounds, presumably hearsay. But the admission of the statement was still proper under *United States v. Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970). There we held that if the trial court judge is properly satisfied that a fair preponderance of nonhearsay evidence indicates that the defendant participated in the conspiracy, a statement made during the course of and in aid of the conspiracy is admissible under the coconspirator exception to the hearsay rule, Fed. R. Evid. 801(d)(2)(E). Thus, Riggio's

comment was admissible under this exception.[1] As Judge Carter correctly found, a fair preponderance of the non-hearsay evidence, i.e., Ciambrone's control of T.J., the circumstances and context of his meeting with Miller, and the statements he made at that meeting, indicated that Ciambrone was a member of the conspiracy.

In response to Riggio's threats, Miller asked to meet with Thomas Ciambrone. The rapidity with which that request was satisfied bolsters the conclusion that Ciambrone was involved in the conspiracy. The jury was certainly entitled to infer that Jerry Chambrone relayed to Ciambrone Miller's request of Riggio to see Tom; in accordance with the schedule established by Riggio and Miller, Ciambrone flew from Miami to New York the following day, as Riggio informed Miller Ciambrone would. The latter's repeated calls and banging on the Apple office door, coupled with his lame excuses about having been in the area to meet with CSC, reinforce the conclusion that Riggio had indirectly conveyed to Ciambrone that it was urgent that he meet promptly with Miller. Moreover, the jury was surely entitled to infer from Thomas Ciambrone's question of Miller at the very beginning of their conversation that Riggio's caution that Miller might be wired had also been relayed to Ciambrone. Ciambrone's reaction to Miller's assertion that Riggio had threatened him is especially significant. He was apparently not surprised by what Miller told him. We

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1. Ciambrone objects, not just to Riggio's statement that he was sent by Ciambrone, but to the admission of a whole series of coconspirator statements on the grounds that they were inadmissible hearsay. Ciambrone's argument with respect to each of these statements is that there is insufficient evidence linking Ciambrone to the conspiracy and that the requirements of *Geaney* were thus not satisfied. Since we find there was adequate evidence under *Geaney*, Ciambrone's objections fail in each instance.

also note that Ciambrone never got angry or attempted to suggest that a threat to blow up or burn down Miller's house was outrageous, illegal, should be investigated, or the like. There is not a shred of evidence through cross-examination of Riggio or otherwise that, having been informed of these threats by Miller, Thomas Ciambrone even made further inquiry about the threats, let alone did anything to prevent them from being carried out.

Riggio's comment to Miller that he was "sent" by Ciambrone, the way in which the Miller-Ciambrone meeting was set up, Ciambrone's reaction to Miller's statements about Riggio, and the nature and extent of Ciambrone's ties with T.J. in general and Riggio in particular taken together warrant the inference that Ciambrone knew of the conspiracy. This inference is supported by the fact that the conversation with Miller shows a consciousness of guilt. Surely Ciambrone's question relative to his being tape recorded conveys the suggestion that perhaps he will not go as far as he would like to because he believes he might be tape recorded, which in turn would convey to Miller more apprehension than he might otherwise feel. Ciambrone's statement that "if it comes down, it may be very bad for me for being here . . . . [']Cause they could say well I came to see you and whatever else is involved," implies, at least as one inference, that the "they" he refers to there is not just CSC, though only a sentence later his use of "they" does refer to CSC. Ciambrone also attempted to distance himself from Riggio in a way that suggests consciousness of guilt. He stated that Joe Riggio had not worked for him for years, though the jury could fairly infer that he must have known from his brother Jerry that Riggio had indeed set up the meeting with Miller two days before. In

apparent reference to Riggio's threats, Ciambrone says, "Don't wanna know about it, I don't care to know about it."

The jury could also validly find that the conversation with Miller was an act in furtherance of the extortionate scheme. Admittedly, the conversation contains repeated disavowals by Ciambrone that he himself would do business through threats, and the menacing interpretations urged by the Government are too tenuous to accept. At the same time, Ciambrone's reference to other messenger services, especially those in armored cars, as not bothering to touch CSC "because they know the situation" as well as the reference to T.J. drivers being "pissed off" and ready to take things into their own hands left to Miller's imagination just what Riggio's relationship to the T.J. drivers was, if any, and certainly did nothing to allay Miller's fears. As Judge Carter said in ruling on Ciambrone's motion for a judgment of acquittal prior to submission to the jury pursuant to Federal Rules of Criminal Procedure 29(c): "Viewing this conversation . . . as a whole, the implication is that Mr. Thomas Ciambrone is warning Mr. Miller that although he is not at fault and he may be innocent, there will be serious trouble for him unless he gets out of his association with Computer Sciences." And when the references to potential violence are seen in light of the visit Riggio had paid a couple of days before, the jury could readily infer that Ciambrone knowingly aided the conspiracy by attempting to convey to Miller that violence was an appropriate response if Miller refused to back down.

United States v. Cianchetti, 315 F.2d 584, 587 (2d Cir. 1963), does not help Ciambrone. There, the evidence showed that defendant "abstain[ed]" from criminal activ-

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ity. Here, all that is necessary for proof of guilt is that an overt act or act were performed by one or more of the conspirators, coupled with evidence that Ciambrone joined in the unlawful agreement. *See United States v. Piampiano*, 271 F.2d 273, 275 (2d Cir. 1959). It is true that Ciambrone in portions of the conversation denied threatening Miller and portrayed himself as a man who acts in accordance with law. Nevertheless, the conversation sufficiently related to violence so that, when coupled with Ciambrone's inquiry as to whether the conversation was being tape recorded, it was proper for the jury to treat the conversation as if Ciambrone was simply trying to protect himself while nevertheless lending weight to the conspiratorial scheme. In sum, there was an adequate basis for the conviction on Count One, the conspiracy count.

Ciambrone's guilt of the crimes charged in Counts Four, Five, and Six involving the threat to the bodily parts of the driver Scott Kunzelman, the firebombing of Miller's house, and the firebombing of the Apple office was properly founded on correctly charged alternative theories. The first is based on *Pinkerton v. United States*, 328 U.S. 640 (1946), by virtue of which a member of a conspiracy may be held criminally liable for substantive offenses committed by his co-conspirators in furtherance of the conspiracy when those crimes were a "reasonably foresee[able]" consequence of the agreement. *Id.* at 647-48. Proof that a defendant knew of the conspiracy's essential nature is sufficient. *See United States v. Provenzano*, 615 F.2d 37, 44 (2d Cir.), *cert. denied*, 446 U.S. 953 (1980). Given Ciambrone's participation in the conspiracy, the threat made to Harrison about Kunzelman as well as the firebombings themselves were reasonably fore-

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seeable within the meaning of *Pinkerton*, 328 U.S. at 646-48. *See also United States v. Cirillo*, 468 F.2d 1233, 1239 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973). Ciambrone's convictions on the substantive counts of attempted extortion were also proper under the alternative aiding and abetting theory, which was also charged to the jury. By virtue of Ciambrone's meeting with Miller, Ciambrone lent weight and authority to the prior and subsequent threatening conduct and action by Jerry Chambrone and Riggio, especially by referring to the steps and possible retaliation that the T.J. drivers might take if Miller kept the CSC contract. It was immaterial that Ciambrone was not proven to be specifically aware of the particular means used to carry out the criminal activity, *see United States v. Beck*, 615 F.2d 441, 448-52 (7th Cir. 1980); *United States v. Austin*, 585 F.2d 1271, 1277 (5th Cir. 1978); *United States v. Erb*, 543 F.2d 433, 445-46 (2d Cir.), *cert. denied*, 429 U.S. 981 (1976), or to have "participated in every phase of the criminal venture." *United States v. Diecidue*, 603 F.2d 535, 557 (5th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980).

Ciambrone argues that the district court's instruction to the jury on conscious avoidance lacked any basis in evidence and suggested that the Government was not required to establish that he was a willful participant in the conspiracy. The instruction given is set forth in the margin.[2] It was given, however, in connection with the substantive counts of attempted extortion rather than in

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2. In determining whether the defendant you are considering acted knowingly and wilfully, you may consider whether that defendant deliberately closed his eyes to what otherwise would have been obvious to him, and that is a consideration of some importance in this case, particularly with regard to Thomas Ciambrone's contentions.

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connection with the conspiracy count. As we held in *United States v. Mankani*, 738 F.2d 538, 547 & n.1 (2d Cir. 1984), membership in a *conspiracy* cannot be proven by conscious avoidance, since the requisite mental state for conspiracy is intent. Conscious avoidance of participating in a conspiracy and agreeing to be a member of a conspiracy are mutually exclusive concepts. But the instructions here were given in accordance with Judge Carter's previous indication that he would "explain the charge of conspiracy after I have explained the other substantive counts in the indictment"; they were given only in respect to the substantive counts. The judge repeated after giving the conscious avoidance instruction that "I have just reviewed with you the elements of the substantive charges set forth in Counts Two through Seven. In a moment I will review with you the elements of the conspiracy charge set forth in Count One."

He then discussed in depth Count One, the conspiracy count, and clearly stated that "[t]he gist or essence of the

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It is settled law that a finding of guilty knowledge may not be avoided by a showing that the defendant simply closed his eyes to what was going on about him; "see no evil" is not a maxim in which the criminal defendant should take any comfort.

Guilty knowledge cannot be established by demonstrating mere negligence or even foolishness on the part of a defendant. However, it is not necessary, for instance, that the government prove to a certainty that Thomas Ciambrone knew that Joseph Riggio, for example, was directly threatening physical injury and violence in demanding that Apple stop doing business with Computer Sciences. You may find the defendant had such knowledge if he was aware of a high probability that it was so, unless he actually believed that no threats were being employed by Riggio.

Thus, if you find that the defendant you are considering acted with deliberate disregard of whether threats were used and with a conscious purpose to avoid learning the truth, the requirement of knowledge would be satisfied, unless the defendant actually believed that threats were not used.

offense is a combination or mutual agreement by two or more persons to disobey or disregard the law." He spelled out that the evidence on the conspiracy count must show beyond a reasonable doubt that "two or more persons in some way or manner positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan"; that the defendant "whom you are considering wilfully became a member of such conspiracy"; that "one of the conspirators during the existence of the conspiracy knowingly committed at least one of the means or methods or overt acts described in the indictment" and that such act was "knowingly committed" in an effort to accomplish some object or purpose of the conspiracy. He then essentially repeated these elements in more depth and made clear that in determining whether a given defendant was a member of an alleged conspiracy "the jury should consider only that evidence, if any, pertaining to his own acts and statements" and that a defendant is not responsible for the acts or declarations of other alleged participants until it is established beyond a reasonable doubt, first, that a conspiracy existed and, secondly, from the evidence of his own acts and statements that the defendant was one of its members." In standard language he charged that

> mere presence at the scene of an alleged transaction or mere similarity of conduct among various persons and the fact that they may have associated with each other and may have assembled together and discussed common aims and interests does not necessarily establish proof of the existence of a conspiracy.

He added: "Also, a person who has no knowledge of a conspiracy but who happens to act in a way which

advances some object or purpose of a conspiracy does not thereby become a conspirator."

In short, the conscious avoidance charge was given only as to the substantive counts as to which the evidence warranted the giving of the charge. The charge thus guided the jury as it deliberated about those counts and considered Ciambrone's conversation with Miller and Riggio's testimony that, after Ciambrone's conversation with Miller, Ciambrone never contacted Riggio to find out what he had said to Miller or to determine whether Miller's allegation that he had been threatened was true. *See, e.g., United States v. McAllister*, 747 F.2d 1273, 1275 (9th Cir. 1984) (upholding conscious avoidance charge), *cert. denied*, 106 S. Ct. 92 (1985).

Appellant also claims juror taint. On the second day of deliberations, Juror Number Twelve informed the court that during those deliberations Juror Number Four had remarked that the defendants were "on the fringe of the Mafioso" or "part of the mob." With the consent of all counsel, the court promptly questioned Juror Number Four, who declared that she was "absolutely . . . not" concentrating on the defendants' ethnic background instead of on the issues. She said that she had instead been thinking of the evidence which indicated that the defendants had "connections with other . . . elements . . . in society." When she had expressed her thought in the jury room, Juror Number Twelve had asserted that as an Italian she took Juror Number Four's remarks as a personal insult. The trial judge, after interviewing the jurors involved and satisfying himself that there was not enough in the record to warrant discharging either of them, at the suggestion of counsel recalled the jury and told it that there was

> nothing about the Mafia, about the Mafioso, there is nothing whatever to interfere with your deliberations.
>
> The fact that they are Italian has nothing to do with anything in your deliberations. . . .
>
> This case can't be based upon ethnic values. . . . And the evidence that was introduced, the statements of Mr. Riggio that the Ciambro[n]es had friends in New York, was admitted for your consideration as to whether or not it constituted a threat. It was not admitted for any other purpose and it is only to be utilized by you for the purpose for which it was received, that is, whether you feel that that statement constituted a threat.

On the assumption that this point has been preserved in the absence of an explicit request for the discharge of a juror or the failure to seek a mistrial, there is no probability of prejudice either on the part of one juror or the jury as a whole. Judge Carter properly exercised his discretion: by closely questioning the allegedly biased juror and by giving the jury clarifying instructions, he ensured that the verdict would not be tainted. *See United States v. Read*, 658 F.2d 1225, 1241-42 (7th Cir. 1981).

Ciambrone's argument that the district court abused its discretion in denying his motion for a severance is unavailing. While the case against Ciambrone's brother was considerably stronger than the case against him, there is frequently a disparity in the proof offered against co-defendants. *See United States v. Carson*, 702 F.2d at 366-67. As the different verdicts against the two men suggest, the jury was able to consider the case against Ciambrone without a significant spillover effect from the

case against his brother. Moreover, this was not a case in which incompatible defenses cast one defendant in the position of proving the case against the other. In short, Ciambrone has failed to show "substantial prejudice amounting to a miscarriage of justice," *United States v. Wilkinson*, 754 F.2d 1427, 1435 (2d Cir.), *cert. denied*, 105 S. Ct. 3482 (1985), and in the absence of such a showing his severance argument fails.

Judgment affirmed.

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APPENDIX B

Order Denying Motion for Rehearing and Rehearing En Banc

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 23rd day of May one thousand nine hundred and eighty-six.

UNITED STATES OF AMERICA,

Appellee,

v. No. 84-1249

JERRY A. CIAMBRONE, THOMAS J. CIAMBRONE, JR.,

Defendants,

THOMAS J. CIAMBRONE, JR.,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Thomas J. Ciambrone, Jr.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith,
Clerk

BEST AVAILABLE COPY

NOV 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-75

In the Supreme Court of the United States

OCTOBER TERM, 1986

THOMAS J. CIAMBRONE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in not declaring a mistrial or discharging a juror after investigating allegedly prejudicial remarks made by that juror.

2. Whether the district court erred in giving a "conscious avoidance" instruction to the jury on the substantive offenses charged in the indictment.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 2505-2533) is reported at 787 F.2d 799.

JURISDICTION

The judgment of the court of appeals (Pet. App. 2505) was entered on April 4, 1986, and a petition for rehearing was denied on May 22, 1986 (Pet. App. B). The petition for a writ of certiorari was filed on July 21, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to commit extortion and three counts of attempted extortion, in violation of 18 U.S.C. 1951.[1] He was sentenced to concurrent terms of ten years' imprisonment and a fine of $4,000 on each of the four counts.

1. The evidence at trial, the sufficiency of which is not in dispute, is set out in considerable detail in the opinion of the court of appeals (Pet. App. 2507-2521). Petitioner and his brother, Jerry Chambrone, owned and operated a delivery business called T.J. Associates. Chambrone managed the company from its office in New York. Petitioner resided in Florida, but as president of the company, he was in regular contact with the New York office and made major business decisions. In 1982, Computer Sciences Company ("CSC") withdrew certain delivery routes from T.J. Associates and transferred them to Apple Messenger Service ("Apple"), a company operated by Donald Miller. The evidence at trial showed that petitioner participated in an extortion scheme designed to regain those routes for T.J. Associates. Pet. App. 2507-2508.

After petitioner's company lost CSC's delivery business, Jerry Chambrone discussed the situation with Joseph Riggio. He said that Apple president Miller had infiltrated a trucking route under contract to T.J. Associates and asked Riggio to talk to Miller and "make the man understand what he was doing wasn't right" (Pet. App.

---

[1] Petitioner was acquitted on three counts of attempted extortion. Co-defendant Jerry A. Chambrone, who was tried with petitioner, was convicted on the conspiracy count and on four counts of attempted extortion. Co-defendent Joseph Vincent Riggio, Jr., pleaded guilty to the conspiracy count and to one count of attempted extortion.

2508). Riggio went to Miller's home on November 20, 1982. Stating that he had been sent by petitioner, Riggio urged Miller to stop doing business with CSC. He compared the trucking business to the garbage business and told Miller that truckers have "area rights" and that "the only way to survive" was to have "respect for each other's work" (*id.* at 2508-2508). Riggio also told Miller that petitioner had "obligations" in New York City and that "certain friends" took a personal interest in petitioner's and Chambrone's business dealings and financial obligations (*id.* at 2509). In addition, Riggio threatened to burn down Miller's house and blow up his car (*id.* at 2508).

Miller responded by telling Riggio that he wanted to speak to petitioner, and Riggio agreed to arrange a meeting. Riggio then told Chambrone about his conversation with Miller. He warned Chambrone that petitioner's upcoming meeting with Miller should be "strictly business" because Miller might tape-record it. Chambrone agreed to relay that information to petitioner (Pet. App. 2509). Two days later, petitioner flew to New Jersey from Florida. On November 23, 1982, petitioner met with Miller at Miller's home. Miller taped the conversation, which was central to the case against petitioner.

Petitioner began the conversation by inquiring whether Miller was tape-recording him (Pet. App. 2510). Miller denied that the conversation was being recorded. Petitioner then stated that his company's contract with CSC was "exclusive" and that CSC did not have the right to do what it was doing. He stated that "all the other messenger services, heavy, heavy messenger services, uh, armored trucks * * * they haven't bothered to touch it [CSC] because they know the situation * * *" (*id.* at 2510-2511). He warned Miller that a ridiculous lawsuit would result from CSC's transfer of the delivery route to Apple and cited to Sacco and Vanzetti as an example of

what could happen in court. He warned Miller that the T.J. Associate drivers were "pissed" and that they were going to take matters into their own hands (*ibid.*).

When Miller told petitioner that he was being threatened, petitioner stated "[n]ot by me you're not" (Pet. App. 2511). Miller said that Riggio claimed to have been sent by petitioner, but petitioner denied that Riggio worked for him. Miller again complained about the threats, stating that Riggio had threatened to burn Miller's house down (*id.* at 2513). Petitioner neither expressed outrage nor stated that he would try to stop Riggio from making or carrying out such threats; rather, he merely stated that he "ha[d] no idea about that" and again denied that he had sent Riggio (*ibid.*). Petitioner further stated: "As far as people coming up to talk to you or do things, I have no idea. [I d]on't wanna' know about it, I don't care to know about it" (*id.* at 2516). Finally, petitioner acknowledged that he was aware that his visit to Miller could cause him problems: "And uh, if it uh, if it comes down, it may be very bad for me for being here. * * * Cause they could say * * * well I came to see you and whatever else is involved" (*id.* at 2517-2518). Petitioner never contacted Riggio, after the conversation with Miller, to find out what Riggio had said to Miller or to determine whether Miller's allegations that he had been threatened were true (*id.* at 2518).

Following petitioner's meeting with Miller, Chambrone made threats to an Apple driver and a CSC employee. In addition, someone began following the car of Brinson Weeks, the CSC employee responsible for transferring the delivery routes to Apple. Six months later, Weeks' car was set on fire as it sat in his apartment parking lot. Later, Chambrone remarked to CSC employees that whoever had firebombed Weeks' car had "only warned him" and that, if he were to do it, he would make sure Weeks was in the car (Pet. App. 2519-2520).

When it became clear that CSC would not voluntarily reverse its decision concerning the delivery routes, Chambrone instructed Riggio to burn one of the Apple driver's cars. Riggio made two unsuccessful attempts to do so. Subsequently, Chambrone told Riggio that Miller "should be taught a lesson" and discussed blowing up Miller's house. Riggio warned Chambrone that "they are going to come down like a ton of bricks on us * * *. All of us, probably your brother, you, me" (Pet. App. 2520). Chambrone nonetheless stated that he wanted it done and agreed to pay Riggio $4,000 for the job. Pursuant to those instructions, Riggio burned down Miller's house and office on October 5, 1983. Riggio was arrested the next day. Later that morning, a brief collect telephone call was placed from the T.J. Associates office in New York to petitioner's residence in Florida (*id.* at 2521).

2. In instructing the jury on the elements of the substantive extortion counts, the trial court gave the following "conscious avoidance" charge (Pet. App. 2528-2529; Tr. 814-816):

> In determining whether the defendant you are considering acted knowingly and wilfully, you may consider whether that defendant deliberately closed his eyes to what otherwise would have been obvious to him, and that is a consideration of some importance in this case, particularly with regard to [petitioner's] contentions.
>
> It is settled law that a finding of guilty knowledge may not be avoided by a showing that the defendant simply closed his eyes to what was going on about him; "see no evil" is not a maxim in which the criminal defendant should take any comfort.
>
> Guilty knowledge cannot be established by demonstrating mere negligence or even foolishness on the

> part of a defendant. However, it is not necessary, for instance, that the government prove to a certainty that [petitioner] knew that Joseph Riggio, for example, was directly threatening physical injury and violence in demanding that Apple stop doing business with Computer Sciences. You may find [petitioner] had such knowledge if he was aware of a high probability that it was so, unless he actually believed that no threats were being employed by Riggio.
>
> Thus, if you find that the defendant you are considering acted with deliberate disregard of whether threats were used and with a conscious purpose to avoid learning the truth, the requirement of knowledge would be satisfied, unless the defendant actually believed that threats were not used.

3. During the second day of deliberations, juror Rosemarie Stolfa advised the court that she was having a problem with one of the other jurors (Tr. 858-859). The court, in the presence of government and defense counsel, questioned Stolfa about the problem (Tr. 860-864). Stolfa informed the court that another juror had stated during deliberations that the defendants were "part of the mob," that they were guilty, and that she "hated them" and wanted to "crush them" (Tr. 861-862). Stolfa stated that she resented the remarks and that she felt that the juror who made those remarks was prejudiced (Tr. 862-863).

After learning from juror Stolfa that the juror in question was Elizabeth Haney, the court, in counsel's presence, twice questioned Haney about the incident (Tr. 866-869, 872-873). Haney explained that her remarks had not been based on any ethnic bias, but rather on testimony at trial indicating that the defendants were "on the fringes of the Mafioso" and had "connections with other * * * elements * * * in society" (Tr. 869). Haney stated that juror Stolfa had mistakenly taken her remarks as a

personal insult and denied having stated that "we have to convict these people" (Tr. 872).

After the initial questioning of juror Haney, the court stated that her remarks had been prompted by the testimony at trial and that they did not indicate that she was prejudiced or biased (Tr. 870-871). Counsel for co-defendant Chambrone suggested discharging juror Haney (Tr. 874). Petitioner's counsel did not join that motion, but suggested that the court instruct all the jurors that the "Mafia" and the defendants' ethnic background had nothing to do with the case and that the jury should decide the case on the basis of the evidence presented (*ibid.*). The court thereafter explained to juror Stolfa that there apparently had been a misunderstanding and that juror Haney's remarks had not been based on any bias against Italians but rather on certain evidence at trial (Tr. 876). The court then instructed the entire jury along the precise lines suggested by petitioner's counsel and inquired whether any of the jurors felt unable to follow the instructions (Tr. 879-880). None of the jurors expressed an inability to do so.

4. The court of appeals affirmed petitioner's convictions (Pet. App. 2505-2533). The court first held that there was sufficient evidence to support the jury verdict that petitioner had intentionally conspired to commit extortion. In reaching that conclusion, the court pointed to petitioner's control of T.J. Associates, his participation in the nonextortionate parts of the plan to win back CSC's business, the circumstances and content of the critical conversation with Miller, and Riggio's statement to Miller that petitioner had sent him (Pet. App. 2521-2527). The court also concluded that petitioner was properly convicted of the substantive extortion offenses under two distinct theories (*id.* at 2527-2528). First, under *Pinkerton* v. *United States*, 328 U.S. 640 (1946), the court held

that petitioner was liable on the substantive counts, because the attempted extortion offenses were reasonably foreseeable and were committed by petitioner's co-conspirators in furtherance of the conspiracy. Second, the court ruled that petitioner was liable for the substantive offenses under an aiding and abetting theory, because petitioner's meeting with Miller "lent weight and authority to the prior and subsequent threatening conduct and action by Jerry Chambrone and Riggio" (Pet. App. 2528).

The court of appeals also rejected petitioner's challenge to the "conscious avoidance" instruction (Pet. App. 2528-2531). The court found that the instruction had been given only in connection with the substantive counts of attempted extortion, not in connection with the conspiracy count. Accordingly, the instruction did not run afoul of *United States* v. *Mankani*, 738 F.2d 538, 547 & n.1 (2d Cir. 1984), in which the court had held that membership in a conspiracy cannot be proven by conscious avoidance, because the requisite mental state for conspiracy is intent. The court further concluded that the evidence warranted giving the charge, because petitioner's failure to make any inquiry or to take any action after being told of Riggio's threats might well be considered conscious avoidance of knowledge of the threats being made on his behalf (Pet. App. 2531).

Finally, the court of appeals also rejected petitioner's claim of jury impropriety (Pet. App. 2531-2532). Assuming the issue had been preserved even though petitioner made no request to discharge juror Haney or to declare a mistrial, the court held that there was no probability of prejudice from the conduct of juror Haney or the jury as a whole (*id.* at 2532). The court of appeals reasoned that the trial court had properly exercised its discretion in questioning juror Haney and in giving the jury cautionary

instructions. By doing so, the court held, the trial court had ensured that the verdict would not be tainted (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. Petitioner argues first (Pet. 11-17) that his right to a fair trial was abridged when the district court, after learning of juror Haney's alleged bias, refused to discharge Haney from the jury and allowed the trial to proceed. Petitioner contends that the court of appeals' ruling on this claim conflicts with the Eleventh Circuit's decision in *United States* v. *Heller*, 785 F.2d 1524 (1986). That contention does not warrant review.

To begin with, petitioner has not preserved the issue. At no time after the identification or questioning of juror Haney did petitioner's counsel request either a mistrial or the discharge of juror Haney.[2] Although counsel for petitioner's co-defendant suggested discharging juror Haney (Tr. 874), petitioner's counsel recommended instead the very procedure that the trial court ultimately adopted. Having proposed that course of conduct, petitioner cannot now argue that the trial court's actions constituted error. See *United States* v. *Jones*, 763 F.2d 518, 523-524 (2d Cir. 1985), cert. denied, No. 85-643 (Nov. 12, 1985);

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[2] Prior to learning which juror made the remarks complained of by juror Stolfa, petitioner's counsel said that if the juror really was biased "it seems to me that she's gone" (Tr. 865). But that comment was made before counsel heard what the remarks were or whether they evinced bias. After the interviews with juror Haney, petitioner's counsel did not request a mistrial or the discharge of the allegedly tainted juror.

United States v. *Ferguson*, 758 F.2d 843, 851-852 (2d Cir. 1985), cert. denied, No. 84-6967 (Oct. 7, 1985).

On the merits, petitioner's argument rests on a critical mischaracterization of the record. Petitioner twice states in his petition (Pet. 15, 16-17) that, when questioned by the trial court about the incident in question, juror Haney admitted her ethnic bias. As the court of appeals noted (Pet. App. 2531), however, that is not what occurred. Juror Haney did not admit to ethnic bias, and the district court found that her remarks were based on the evidence at trial and not on prejudice against any ethnic group (Tr. 869-871). Thus, the premise of petitioner's argument of juror taint is simply incorrect.

More broadly, the record shows that petitioner was not deprived of a fair trial. The trial court, being in the best position to evaluate the effect on the jury of events at trial, is afforded broad discretion when confronted with allegations of juror misconduct or prejudice. *United States* v. *Gigante*, 729 F.2d 78, 82 (2d Cir.), cert. denied, 467 U.S. 1206 (1984); *United States* v. *Yonn*, 702 F.2d 1341, 1344-1345 (11th Cir.), cert. denied, 464 U.S. 917 (1983); *United States* v. *Barnes*, 604 F.2d 121, 144 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980); cf. *United States* v. *Laymon*, 621 F.2d 1051, 1053 (10th Cir. 1980). For the same reason, the trial court's determination whether a mistrial is warranted is entitled to special weight. *Arizona* v. *Washington*, 434 U.S. 497, 510 (1978). Here, the trial court fully questioned jurors Stolfa and Haney and determined that juror Haney was not laboring under any preconceived notion of petitioner's guilt and did not harbor any ethnic bias against petitioner. Thereafter, at the suggestion of petitioner's counsel, the court carefully instructed the jury that thoughts about the "mob" or the defendant's ethnic background were to play no role in the deliberations and that the verdict was to be based entirely

on the evidence. No juror voiced an inability to comply with those instructions, and it must be presumed that the jury complied with them. *Tennessee* v. *Street*, No. 83-2143 (May 13, 1985), slip op. 5, 7-8; *Francis* v. *Franklin*, No. 83-1590 (Apr. 29, 1985), slip op. 16, n.9; *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341, 367 (1963).[3] In these circumstances, the court of appeals correctly held that the trial court's actions eliminated any question of juror taint.

Finally, the decision of the court of appeals is not in conflict with the Eleventh Circuit's decision in *United States* v. *Heller, supra*. There, several jurors had commented on the testimony during the course of the trial, they had made numerous blatantly anti-Semitic and racial slurs in the presence of the entire jury, they had stated a predisposition to "hang" the Jewish defendant, and one of the jurors had independently consulted an accountant about issues pertaining to the trial and reported the results to the jury. The court of appeals reversed the conviction on three grounds: (1) that the obvious bigotry displayed by the jury denied the defendant a fair trial (785 F.2d at 1527-1528) (bigotry here was "so shocking to the conscience and potentially so damaging to public confidence in the equity of our system of justice, that we must act decisively to correct any possible effects on this appellant"); (2) that several jurors had entertained a presumption of guilt at the beginning of the trial; and (3) that the jury had received extrinsic evidence concerning a material matter in the case (*id.* at 1528).

Nothing similar occurred in petitioner's case. Not only was there no resort to extrinsic evidence, but there was

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[3] The jury's acquittal of petitioner on three counts is also significant. Such a discriminating verdict supports the finding that the jury's decision was based on an examination of the evidence, and not on bias or prejudice. *United States* v. *Gigante*, 729 F.2d at 82.

nothing resembling the pervasive misconduct that tainted the jury in *Heller*. The only conduct alleged to taint the jury deliberations in this case was limited to a single incident involving the remarks of a single juror within the hearing of only one other juror. Most important, however, this case differs critically from *Heller* in that the district court here found that the challenged remarks were not indicative of prejudice at all, but were based on evidence at trial.

2. Petitioner also argues (Pet. 18-23) that the "conscious avoidance" charge to the jury lacked any basis in the evidence and improperly relieved the government of the obligation to prove intent, an essential element of both the conspiracy count and the substantive counts of attempted extortion. The court of appeals properly rejected that contention.

First, the court of appeals did not relieve the government of the obligation to prove that petitioner intentionally joined the conspiracy. That obligation, as the court held in *United States* v. *Mankani*, 738 F.2d at 547 n.1, cannot be met by establishing conscious avoidance, since the requisite mental state for conspiracy is intent, and not mere knowledge. The court of appeals in this case followed its earlier ruling on that point. See Pet. App. 2529 ("Conscious avoidance of participating in a conspiracy and agreeing to be a member of a conspiracy are mutually exclusive concepts"). In this case, the court found (*id.* at 2528-2529) that the conscious avoidance instruction was given only in connection with the substantive counts of attempted extortion, and not in connection with the conspiracy count.[4] Thus, without the aid of a

---

[4] As other Second Circuit cases make clear, a conscious avoidance charge may properly be given on a conspiracy count if it is directed only to guilty knowledge of the specific details of the conspiracy and if the court otherwise makes clear that the government must prove that

conscious avoidance charge, petitioner was proved to have intentionally joined the conspiracy to commit extortion.

Second, the conscious avoidance charge was properly given on the substantive counts of the indictment. It is well established that when an essential mental element of a crime is "guilty knowledge," a defendant may not escape responsibility for his actions by deliberately shutting his eyes to avoid learning what otherwise would be obvious. See, *e.g.*, *United States* v. *Jewell*, 532 F.2d 697, 700 (9th Cir.), cert. denied, 426 U.S. 951 (1976); *United States* v. *Guzman*, 754 F.2d 482, 488 (2d Cir. 1985), cert. denied, No. 84-1604 (Jan. 13, 1986).

It is undisputed in this case that guilty knowledge was an essential element of the attempted extortion counts. Moreover, there was an ample evidentiary basis for giving the "conscious avoidance" charge. During petitioner's November 23 conversation with Miller, after being told that Riggio had made threats in petitioner's name, petitioner replied that he "had no idea" about that and that he "[didn't] wanna' know about it, I don't care to know about it." Following the November 23 conversation, petitioner never contacted Riggio either to ask what he had said to Miller or to stop him from making further threats in petitioner's name and on behalf of petitioner's business. The court of appeals thus correctly concluded that the evidence permitted the inference that petitioner, who

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the defendant willfully participated in the conspiracy with the specific intent to further its criminal objective. See, *e.g.*, *United States* v. *Guzman*, 754 F.2d 482, 488 (1985) ("After—and only after—reiterating the government's burden of proof * * * [as to willful participation in the conspiracy with specific intent to further its criminal objective], the district court correctly instructed the jury [on conscious avoidance] as to a quite distinct matter—the knowledge of individual defendants with regard to the specific details of the conspiracy's operation."); *United States* v. *Mohabir*, 624 F.2d 1140, 1154 (1980).

willfully participated in the overall plan to force Miller to relinquish the delivery routes formerly held by T.J. Associates, was aware of the high probability that threats had been made to Miller, yet deliberately avoided knowing all the details of those threats.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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NOVEMBER 1986

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